



INTERIOR BOARD OF INDIAN APPEALS

Tanana Chiefs Conference, Inc. v. Juneau Area Director, Bureau of Indian Affairs

14 IBIA 87 (04/04/1986)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

TANANA CHIEFS' CONFERENCE, INC.

v.

AREA DIRECTOR, JUNEAU AREA OFFICE, BUREAU OF INDIAN AFFAIRS

IBIA 85-38-A

Decided April 4, 1986

Appeal from a denial of a fiscal year 1985 Indian Child Welfare Act grant application.

Dismissed.

1. Bureau of Indian Affairs: Administrative Appeals: Filing: Mandatory Time Limit

Regulations promulgated by the Bureau of Indian Affairs in 25 CFR 2.10 establish a 30-day period for filing notices of appeal.

APPEARANCES: Michael J. Walleri, Esq., Fairbanks, Alaska, for appellant; Roger L. Hudson, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

On June 17, 1985, the Board of Indian Appeals (Board) received a motion to assume jurisdiction over an appeal filed with the Deputy Assistant Secretary--Indian Affairs (Operations) (Deputy Assistant Secretary). The appeal, filed by the Tanana Chiefs' Conference, Inc. (appellant), sought review of a March 1, 1985, decision of the Juneau Area Director, Bureau of Indian Affairs (BIA; appellee), denying appellant's application for fiscal year 1985 grant funding under the Indian Child Welfare Act (ICWA), Nov. 8, 1978, P.L. 95-608, Title II, 92 Stat. 3075, 25 U.S.C. §§ 1931-1934 (1982). ^{1/} For the reasons discussed below, the Board dismisses this appeal as untimely filed.

Background

Appellant is the regional Native nonprofit corporation for interior Alaska and serves 43 interior Athabascan villages as the contracting consortium for BIA services under the Indian Self-Determination and Education

^{1/} All citations to U.S.C. are to the 1982 edition.

Assistance Act, Jan. 4, 1975, P.L. 93-638, 88 Stat. 2203, 25 U.S.C. §§ 450-450n. On February 1, 1985, appellant applied for a fiscal year 1985 grant under the ICWA. The application was filed with the Fairbanks Agency, BIA, and was forwarded to the Juneau Area Office (Area Office) for review.

A grant selection committee was appointed by appellee to review all ICWA applications received. The use of such a grant selection committee for initial review of applications is authorized by 25 CFR 23.31(a)(3). 2/ According to the notice of availability of fiscal year 1985 funds, published in 49 FR 44606, 44607 (Nov. 7, 1984):

The BIA's Assistant Secretary or his/her designated representative shall select for grants under the Indian Child Welfare Act those proposals which will in his/her judgment best promote the purposes of the ICWA. Such selection will be made through a review process in which each application will be scored competitively using the BIA review criteria listed below at the appropriate Bureau Social Service Office referred to in 25 CFR 23.30, 23.31, or 23.33. Grant applications will be reviewed by a panel of reviewers qualified by training and/or experience in human services to Indian populations.

The Area Office grant selection committee consisted of five individuals. One committee member, the Coordinator for the Alaska Native Education Program of the Fairbanks-Northstar Borough School District, also served on the Board of Directors of the Fairbanks Native Association (FNA). FNA also applied for a fiscal year 1985 ICWA grant. The committee member disclosed the association with FNA, and was prohibited from considering FNA's grant application, but was permitted to review the applications of other organizations that were competing with FNA for the same limited grant funds. 3/

2/ Section 23.31(a)(3) states: "Upon receipt of an application for a grant requiring Area Office preliminary approval, the Area Director shall * * * [a]ssess the completed application for appropriateness and priority of purpose as prescribed in § 23.22, and for overall feasibility, through a selection committee process."

3/ Because of the Board's disposition of this case, it does not reach the merits of appellant's claim that this situation constituted a conflict of interest. BIA apparently believed that no conflict of interest existed because the committee member received no compensation for services on FNA's Board of Directors, and consequently there was no direct financial incentive for the committee member to be influenced in evaluating other ICWA applications. The Board notes that in his answer brief, appellee admitted that it would have been better if BIA had employed a more realistic definition of conflict of interest and this particular person had not served on the committee. Such an admission, coupled with future action, appears appropriate, especially in view of the congressional statement in the ICWA at 25 U.S.C. § 1901(3) that "the United States has a direct interest, as trustee, in protecting Indian children." Under such circumstances BIA should avoid even the appearance of impropriety.

BIA determined that an average score of 85 from the review committee was necessary to be considered for a grant. Appellant received an average score of 75. By letter dated March 1, 1985, the Area Office's Director, Division of Native Services, informed appellant that its grant application was not approved. Rather than mailing this letter to appellant's listed contact person, BIA hand delivered the letter on March 1, 1985, to appellant's Director of Education and Employment, who happened to be in Juneau. Appellant's appeal from this decision to the Deputy Assistant Secretary, dated April 5, 1985, was received by the BIA Central Office in Washington, D.C., on April 9, 1985, and by the Area Office on April 13, 1985.

When the Deputy Assistant Secretary did not issue a decision in the appeal within 30 days from the date it was ripe for decision, appellant sought to have the appeal transferred to the Board. Appellant's motion for the Board to assume jurisdiction was received on June 17, 1985. By order dated June 18, 1985, the Board made a preliminary determination that it had jurisdiction over the appeal, and requested the administrative record. This order was sent to the Deputy Assistant Secretary. The Board received the record on July 18, 1985, and issued a notice of docketing on July 19, 1985. ^{4/} Both appellant and appellee filed briefs in the appeal. In addition, after the conclusion of the briefing period, appellee filed a motion to dismiss the appeal on the grounds that the notice of appeal to the Deputy Assistant Secretary was not timely filed. Appellant opposed dismissal.

Discussion and Conclusions

[1] The initial question before the Board is whether appellee's motion to dismiss should be granted. Under 25 CFR 2.10(a):

A notice of appeal [to a higher BIA official] shall be in writing and filed in the office of the official who made the decision that the appellant wishes to appeal.
 * * * The notice of appeal must be received in the office of the official who made the decision within 30 days after the date notice of the decision complained of is received by the appellant, together with all supporting documents.

Section 2.10(b) provides that "[n]o extension of time will be granted for filing of the notice of appeal. Notices of appeal which are not timely will not be considered, and the case will be closed."

Appellee indicates the untimeliness of appellant's appeal was not recognized until after the briefing period. He now contends appellant received notice of the denial of its grant application on March 1, 1985, when a copy of the denial letter was hand-delivered to appellant's Director of Education

^{4/} The record contains the original of a decision dated July 11, 1985, and signed by the Acting Deputy Assistant Secretary affirming the denial of appellant's grant application. A handwritten notation on the letter reads "Letter not sent out - Board of Indian Appeals accepted jurisdiction."

and Employment. Appellee states the notice of appeal to the Deputy Assistant Secretary was dated April 5, 1985, and was received in BIA's Central Office on April 9, 1985, and in his office on April 18, 1985. Because all of these dates are more than 30 days after March 1, 1985, appellee argues the appeal was not timely filed and must be dismissed.

Appellant raises two arguments against dismissal: (1) notice to its Director of Education and Employment was not effective and therefore, its appeal period was tolled under 25 CFR 2.4, 5/ and (2) section 2.10 was waived as allowed under 25 CFR 1.2. 6/ Although under other circumstances either of these arguments might be pervasive, 7/ they cannot be accepted in this case.

Here, appellant undermines its own first argument by admitting receipt of appellee's denial letter on March 1, 1985, and initially using that date as the operative date for determining its appeal period, without reference to any alleged deficiencies of service. See appellant's opening brief to Deputy Assistant Secretary at page 1. Furthermore, it admits filing its notice of appeal on April 5, 1985. See appellant's request for the Board to assume jurisdiction at page 1. Appellant's second argument is countered by affidavits from BIA officials stating that the late filing was not initially noticed and that no waiver was granted. Because of appellant's admissions and appellee's statement that no waiver was granted, the Board must find that appellant's notice of appeal to the Deputy Assistant Secretary was not timely filed. See Parsons v. Deputy Assistant Secretary--Indian Affairs (Operations), 14 IBIA 79 (1986); Hamlin v. Portland Area Director, 9 IBIA 16 (1981); Benson-Montin-Greer Drilling Corp. v. Acting Albuquerque Area Director, 7 IBIA 67 (1978).

5/ Section 2.4 states in pertinent part: "Failure to give [written] notice [of an administrative decision] shall not affect the validity of the action or decision, but the right to appeal therefrom shall continue under the regulations in this part for the periods hereinafter set forth."

6/ Section 1.2 states in pertinent part:

"Notwithstanding any limitations contained in the regulations of this Chapter, the Secretary retains the power to waive or make exceptions to his regulations as found in Chapter I of Title 25 of the Code of Federal Regulations in all cases where permitted by law and the Secretary finds that such waiver or exception is in the best interests of the Indians."

7/ The Board has not previously discussed whether a corporation is effectively served by delivery to an employee of the corporation who is not shown to be an officer of the corporation or a person designated to receive service either by law or act of the corporation. In Cheyenne and Arapaho Tribes of Western Oklahoma v. Deputy Assistant Secretary-- Indian Affairs (Operations), 11 IBIA 54, 57 n.2, 90 I.D. 61, 62 n.2 (1983), the Board found the 25 CFR 2.10 time limit for filing a notice of appeal had been waived under 25 CFR 1.2, despite the failure of BIA to discuss waiver specifically.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal from the Juneau Area Director's March 1, 1985, decision must be dismissed. 8/

//original signed

Jerry Muskrat
Administrative Judge

I concur:

//original signed

Bernard V. Parrette
Alternate Member

8/ Because of this disposition, the Board does not reach the merits of appellant's substantive arguments.